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In the Supreme Court of the United States

OCTOBER TERM, 1974

RONALD GENDRON, APPELLANT

v.

EDWARD H. LEVI,
ATTORNEY GENERAL OF THE UNITED
STATES, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

MOTION TO AFFIRM

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Pursuant to Rule 16(1)(c) of the Rules of this Court, appellees move to affirm the judgment of the district court.

STATEMENT

Appellant enlisted in the Air Force in February, 1969. Four months later—in June, 1969—he was honorably discharged on the ground that he was suffering from psychiatric problems. He applied to the Veterans Administration for disability benefits pursuant to 38 U.S.C. 310-313, which authorize the payment of such benefits when the disability is "service-connected". After consideration of appellant's application and the results of a physical examination, his claim was denied.

Appellant appealed to the Board of Veterans Appeals. He was unable to retain counsel to represent him before the Board because, under 38 U.S.C. 3404(c), attorneys' fees in veterans' benefit cases are limited to $10.[1] Appellant did not attempt to utilize the services of lay personnel, who are representatives of various veterans and patriotic organizations authorized by statute (38 U.S.C. 3402) to provide free assistance to veterans in processing their claims.

Appellant then instituted this suit in the district court to enjoin the operation of the $10 statutory fee limitation, contending that the statute deprived him of liberty and property without due process of law in violation of the Fifth Amendment of the Constitution. The district court, holding that the question presented had been fully resolved by prior decisions of this Court, declined to convene a three-judge district court, and dismissed appellant's complaint (J.S. App. A-26 to A-27). The court of appeals reversed (J.S. App. A-21 to A-25), finding that the complaint presented a substantial constitutional question,[2] and ordered that the case be heard by a three-judge district court pursuant to 28 U.S.C. 2282. Such a court was duly convened and sustained the constitutionality of the challenged statute (J.S. App. A-1 to A-18).

ARGUMENT

The district court correctly held that the fee limitation prescribed by 38 U.S.C. 3404(c) does not constitute a violation of the Due Process Clause. For over a hundred

[1]Section 3404(c) establishes the monetary limit, and Section 3405 (1) prescribes criminal penalties for the receipt of sums in excess of that limitation. The pertinent statutes are set forth in Appendix C to the Jurisdictional Statement, pp. C-1 to C-5.

[2]The court of appeals, however, intimated no view concerning the merits of the case (J.S. App. A-25).

years, Congress has, by statute, established a limitation upon the amount of attorneys fees chargeable for services rendered in connection with claims for veterans benefits.[3] The constitutional validity of the current legislation, or predecessor statutes imposing a lesser fee than that presently fixed by Congress, has been sustained by every court that has considered the question, including this Court.[4] See *Margolin* v. *United States*, 269 U.S. 93; *Hines* v. *Lowrey*, 305 U.S. 85; *Bodey* v. *United States*, 495 F. 2d 1370 (C.A. 4), certiorari denied, 419 U.S. 899; *Hoffmaster* v. *Veterans Administration*, 444 F. 2d 192

[3]Efforts by the Congress to protect the veteran date from the nation's beginnings. Shortly after the adoption of the Constitution, Congress prohibited the "sale, transfer or mortgage * * * of the pension * * * [of a] soldier * * *, before the same shall become due * * *." 1 Stat. 45. The first restriction upon fees was established in 1862, when, during the Civil War, abuses committed by claims agents and the simplicity of adminisrative procedures for asserting claims, prompted Congress to enact a pension bill limiting fees to $5 for presentation of a claim. 12 Stat. 568. Throughout many of the subsequent versions of the statute, the retention of the fee limitation was in part based upon contemporary evidence of exploitation of veterans by claims agents. See *Limitations on Attorneys' Fees Under Federal Law*, American Bar Foundation, pp. 19-21 (May 1961). An historical enumeration of the statutes containing the fee limitation is contained in the Appendix to this motion.

[4]This Court has never considered the precise question presented by appellant, rather its prior decisions (*Margolin* v. *United States*, *supra*, and *Hines* v. *Lowrey*, *supra*) have sustained the fee limitation against challenges to Congress' substantive constitutional power to enact such limitations. Procedural due process claims regarding the fee limitation have, however, been uniformly rejected by the other federal and state decisions cited above. And, as shown at pp. 7-9, *infra*, we submit that (1) appellant's claim to benefits does not implicate the procedural requirements of the due process clause, and (2) even assuming that it does, his attack on the fee limitation is without merit.

(C.A. 3); *Holley* v. *United States*, 352 F. Supp. 175 (S.D. Ohio), affirmed, 477 F. 2d 600 (C.A. 6), certiorari denied, 414 U.S. 1023; *Gostovich* v. *Valore*, 153 F. Supp. 826 (W.D. Pa.), appeal dismissed, 355 U.S. 608; *In re Guardianship of Copsey's Estate*, 10 Cal. 2d 748, 76 P. 2d 691 (Sup. Ct.), certiorari denied, 304 U.S. 574; *In re Descamp's Estate*, 405 Pa. 331, 175 A. 2d 827 (Sup. Ct.). The constitutional power of Congress to limit the amount of attorneys' fees chargeable for the prosecution of claims against the government rests upon its unquestioned authority to protect the public fisc and to assure that governmental benefits are received, without substantial depletion, by the beneficiary for whom they are intended. As this Court, per Brandeis, J., stated in *Calhoun* v. *Massie*, 253 U.S. 170, 174 (relied upon in *Margolin* v. *United States*, *supra*):

> By the enactment, from time to time, of laws prohibiting the assignment of claims and placing limitations upon the fees properly chargeable for services Congress has sought both to prevent the stirring up of unjust claims against the Government and to reduce the temptation to adopt improper methods of prosecution which contracts for large fees contingent upon success have sometimes been supposed to encourage. The constitutionality of such legislation, although resembling in its nature the exercise of the police power, has long been settled.* * * [Footnote and citations omitted.]

In lieu of attorneys' services, Congress has made provison for supplying, without charge, expert lay assistance to the veteran in preparing and presenting his claim. Thus, under 38 U.S.C. 3402, Congress has authorized the administrator of the Veterans Administration to recognize certain veterans and patriotic organizations, and

such others as he may approve, to provide the veteran with free assistance at every stage of the claims process.[5] These organizations employ, on a full-time basis, approximately 2,800 paid individuals who are "familiar with every facet of veterans' laws and VA regulations" to assist the veteran in pressing his claim. Testimony of John J. Corcoran, General Counsel, Veterans Administration, Hearings on the Effect of Legal Fees on the Adequacy of Representation before the Subcommittee on Representation of Citizen Interests of the Senate Judiciary Committee, 93d Cong., 1st Sess., p. 457 (1973)(hereinafter "Hearings").[6] Additional assistance is available

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[5]Organizations expressly named by statute are the Red Cross, the American Legion, the Disabled American Veterans, the United Spanish War Veterans, and the Veterans of Foreign Wars. 38 U.S.C. 3402(a)(1); J.S. App. C-1. Congress has also authorized the Administrator to provide space and office facilities, if available, for "the use of paid full-time representatives of national organizations so recognized." 38 U.S.C. 3402(a)(2); J.S. App. C-1 to C-2.

[6] * * * Most of the recognized veterans' organizations, and most of the States, work with claimants in the preparation, presentation, and prosecution of claims for benefits. These organizations maintain a staff of employees—well trained and experienced—who devote their full-time efforts to assisting veterans and other claimants on a strictly no-charge basis. These men and women are accredited as representatives of the organizations to the Veterans Administration and are accorded every permissible assistance by our personnel, including the right to inspect the individual veteran's claims folder under the authority of the veteran's power of attorney, filed with the VA. These representatives functon not only at the Regional Offices and field stations but also here in Washington at the Central Office and before the Board of Veterans Appeals, both here and in the field. [Hearings, *supra*, at 457.]

through the VA itself and neighborhood veterans' organization where individuals, designated as "Service Officers," utilize their expertise on behalf of the claimant.[7]

These services that are available to veterans[8] without cost are more than sufficient to effectively advance his claim when considered in the context of the VA claims process. First, in the vast majority of cases, the claim involves no serious controversy, and the matter can easily be resolved by the submission of a simple claims form, based upon information readily available in VA files or in the records of the Armed Forces (Hearings, *supra*, at 458). Second, claims determinations made by the VA are "nonadversary proceedings" (38 C.F.R. 19.133(c); see also 38 C.F.R. 3.103(a)). They are *ex parte* in character, where the claimant (or his representative) is provided with a full opportunity to present his case, and faces no antagonist. The Veterans Administration, when conducting hearings to determine the merits of the veteran's claim, is charged with "the obligation * * * to assist claimant in developing the facts pertinent to his claim" (38 C.F.R. 3.103(a)), and "to explain fully the issues and to suggest the submission of evidence which the claimant may have overlooked and which would be of advantage to his position" (38 C.F.R. 3.103(c)). Questions directed to the claimant are "to be framed to explore fully the basis for the claimed entitlement rather than with an intent to refute evidence and to discredit testimony" (*ibid.*).

One such source, on the local level, is the neighborhood veterans' organization. We find in almost every local post or chapter of the national veterans' organizations a person designated as Service Officer or some similar title. While these individuals may be lacking in formal legal training, they have a wealth of experience coupled with a keen desire to be of help to their fellow veterans. They possess a working knowledge of the basic benefits available and a familiarity with the claim forms used and the initial steps necessary to bring a claim properly before the Veterans Administration at the Regional Office. [Hearings, *supra*, at 457.]

[8]The appellant made no attempt to avail himself of these gratuitous services (J.S. App. A-6).

The veteran, therefore, is entitled not only to the services, without cost, of a skilled lay representative at every stage of the proceedings before the VA (38 C.F.R. 3.103(d)), but also receives the assistance of the VA personnel who are charged with determining the validity of his claim in a nonadversary context. Under these circumstances, there is ample warrant to conclude, as Congress evidently has done, that the existing procedures generally provide a veteran with adequate representation at no charge and without any depletion in the amount of benefits awarded to him.

Thus, even assuming that appellant's unproven claim to benefits constitutes "property" subject to the due process clause of the Fifth Amendment (but see pp. 8-9, *infra*), the fee limitation is constitutionally valid. Under the balancing of interests test that is appropriate in a due process inquiry (*Morrissey* v. *Brewer*, 408 U.S. 471, 482-484), we submit that appellant's desire to be represented by counsel is outweighed by the competing governmental interest in preserving benefits undepleted by legal fees. That interest is entitled to particular weight in this case, where, as noted earlier (pp. 4-6, *supra*), Congress has provided a system of free assistance to claimants, and where claims are determined in nonadversary proceedings. There is, therefore, no occasion to disturb the long-standing congressional policy to limit the fees chargeable by attorneys in prosecuting claims for veterans' benefits.[9]

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[9]To be sure, there will be instances where the services of an attorney would be of significant assistance and the veteran will nonetheless be precluded by the statutory fee limitation from obtaining counsel. But it is for Congress to determine whether these instances are sufficiently frequent to warrant the sacrifice of the legitimate interests furthered by the current statutory policy to limit fees. Congress has continually examined the question, both in hearings on the matter (see Hearings, *supra*), and in the consideration of legislation to abolish or modify the existing limitation. In the last decade, numerous bills to alter the limitation have been introduced, but none has been enacted.

2. As the foregoing discussion demonstrates, the statutory fee limitation represents a legitimate and reasonable exercise of congressional power, and thus does not offend the Constitution. However, while reaching this same conclusion, the district court also ruled (J.S. App. A-6 to A-12) that the appellant had failed to advance a sufficient "property" or "liberty" interest to invoke the Fifth Amendment. See *Board of Regents* v. *Roth*, 408 U.S. 564. This alternative basis for the decision below is also correct.

The appellant's alleged property interest consists solely of his unproven claim to benefits and his asserted expectation that he is entitled to those benefits under the law (J.S. 14-18). However, as this Court has held:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. [*Board of Regents* v. *Roth*, *supra*, 408 U.S. at 577.]

An unproven claim to benefits constitutes no more than a "unilateral expectation" of entitlement, lacking the substantiality of claims which have been adjudicated in the claimant's favor, and which serve as the basis of his expectation that the benefits sought are his property. The decisions of this Court make plain that only an established claim to benefits, the right to which has been determined, attains the status of property for purposes of constitutional adjudication. See *Goldberg* v. *Kelly*, 397 U.S. 254 (termination of claimant's pre-existing right to welfare benefits); *Perry* v. *Sindermann*, 408 U.S. 593 (termination of employment status); *Goss* v. *Lopez*, No. 73-898, decided January 22, 1975 (suspension of enrolled students); *Fuentes* v. *Shevin*, 407 U.S. 67 (seizure of claimant's personal property). See also *Board of Regents* v. *Roth*, 408 U.S. 564 (no property interest in continued

employment when no basis for such an expectation). The due process clause applies only to previously established claims because its purpose is "to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined." *Board of Regents* v. *Roth*, *supra*, 408 U.S. at 577. As there can be no legitimate reliance upon a claim that has not been determined to be valid, the district court properly held that the appellant had no property interest sufficient to invoke the Fifth Amendment.[10]

CONCLUSION

It is therefore respectfully submitted that the judgment of the district court should be affirmed.

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[10]The district court also properly rejected appellant's contention that the fee limitation invidiously discriminates against veterans by imposing a lesser fee than Congress has provided in other benefit programs. As the district court observed (J.S. App. A-17), "the matter for which the fees are prescribed differ materially" from those involved here. For example, while, as appellant points out (J.S. 24-25), the Social Security Act permits the payment of a twenty-five percent attorneys' fee (42 U.S.C. 406(a) and (b)) in disability cases, the claimant in such cases is not afforded the benefit of free lay representation and the claims process is frequently more complicated than in veterans' cases. Thus, the programs to which appellant adverts in making his constitutional argument are not alike, and are based upon entirely different considerations than those presented here.

APPENDIX

History of the Agent and Attorney Fee Limitation with Respect to Veterans Benefit Claims

(a) As early as July 14, 1862, Congress limited the fees of agents or attorneys who assisted a claimant in establishing a claim for a pension, bounty or other allowance before the Pension Office (12 Stat. 566). The basic fee authorized was $5.00, with additional small amounts authorized under certain conditions.

(b) This 1862 Act was amended in 1868, raising the authorized fee to $10.00 (13 Stat. 387).

(c) In 1866, a Joint Resolution was adopted involving, "Bounties to Colored Soldiers, and the Pensions, Bounties and Allowances to their Heirs". It contained an agent or attorney fee limitation which ranged from $5.00 to $10.00, depending upon the amount of the claim collected (14 Stat. 367).

(d) The fee limitation applicable to claims for pensions or bounty land, was again changed in 1870 to provide that a fee up to $25.00 could be authorized upon approval by the Commissioner of Pensions. No fee in excess of $10.00, however, could be paid without such approval (16 Stat. 193).

(e) The 1870 provision was repeated in the Pension Law consolidation of 1873 (17 Stat. 586).

(f) In 1878, this fee limitation was changed in pension cases to again limit the authorized fee to $10.00 (20 Stat. 243).

(g) The 1878 Act was repealed in 1884 and Congress again reverted to the $10.00 to $25.00 fee limitation (23 Stat. 98).

(h) In 1890, pensions were granted to soldiers and sailors who were incapacitated for the performance of manual labor, and the Act granting such pensions limited the agent or attorney fees for assisting a claimant under that Act to $10.00 (26 Stat. 182).

(i) In 1892, an Act granting pensions to Army nurses prohibited the payment of any agent or attorney fee (27 Stat. 348). Similar prohibitions were contained in a 1901 Act relating to pensions to remarried widows (31 Stat. 1445), and a 1907 Act granting pensions to certain enlisted men, soldiers and officers, who served in the Civil War and the War with Mexico (34 Stat. 879).

(j) In 1912 and 1916, Acts increasing certain pension benefits included a prohibition against the payment of any agent or attorney fees except where an original claim was involved, and then such fee was limited to $10.00 (37 Stat. 112 and 39 Stat. 844).

(k) In 1917, a 1914 Act establishing the War Risk Insurance Program was amended by providing a new section limiting agent and attorney fees to litigated cases, and even then restricting the fee to 10% of the amount recovered. No fees were authorized unless litigation was involved (40 Stat. 102).

(l) This Act was amended in 1918 and agent and attorney fees were authorized in non-litigated cases up to $3.00 for assisting in preparing necessary claim papers (40 Stat. 555).

(m) In 1918, pensions were granted to widows and minor children of officers and enlisted men who served in the War with Spain, the Philippine Insurrection, or in China. Fees were limited to $10.00 (49 Stat. 903).

(n) Pension benefits were extended to soldiers and sailors of the conflicts listed in subparagraph (m) in 1920 and an agent or attorney fee of up to $20.00 was authorized where the agent or attorney assisted in processing the claim (41 Stat. 982).

(o) In 1922, pension benefits as a result of service set forth in subparagraph (m) were extended to certain new classes of individuals. Agent or attorney fees were limited, however, to those cases involving original claims for pensions, and then not to exceed $10.00 (42 Stat. 834).

(p) In 1924, an Act providing adjusted compensation to veterans of the World War prohibited the payment of any agent or attorney fees (43 Stat. 121).

(q) Also in 1924, laws granting compensation, pension, disability allowance and other similar benefits were repealed and the benefits provided thereby were consolidated into a new World War Veterans' Act. Agent or attorney fees were limited to $10.00 for assistance in the preparation of a claim, and to 5% of the amount recovered in litigated insurance cases (43 Stat. 607).

(r) This Act was amended in 1925 to increase the amount of the agent or attorney fees authorized in litigated insurance cases from 5% to 10% of the amount recovered (43 Stat. 1302).

(s) In 1926, pensions were granted and increased to certain soldiers, sailors, and marines (and their widows) of the Civil and Mexican Wars, and to widows of the War of 1812, and to Army nurses. Attorney fees were limited to $10.00 for assistance in filing original claims (44 Stat. 206).

(t) In 1926, an Act amending the World War Adjustment Compensation Act prohibited the payment of any attorney fee (44 Stat. 826).

(u) Pension benefits were extended or increased again in 1927 to certain soldiers who served in the Indian Wars from 1817 to 1898. A $10.00 fee limitation (applicable to original claims only) was included (44 Stat. 1361).

(v) In 1928, an Act granting pensions and increase of pensions to widows and former widows of Civil War veterans prohibited to payment of any attorney fee (45 Stat. 714).

(w) Pensions were again increased or extended in 1930 to certain soldiers, sailors and nurses of the War of Spain, the Philippine Insurrection or the Chinese Relief Expedition. Agent or attorney fees were limited to $10.00 for original claims (46 Stat. 492). Another 1930 Act increasing pensions as a result of Civil War service contained a similar provision (46 Stat. 529).

(x) As a result of the Consolidation Act of 1930, the Pension Bureau, United Veterans Bureau and the National Homes for Disabled Volunteer Soldiers were merged into the Veterans Administration. No change was made with respect to the various provisions then in effect involving agent or attorney fee limitations. In 1936, however, a law was enacted which made a $10.00 fee limitation applicable to all claims under statutes administered by the Veterans Administration (PL 844, 74th Congress; 38 USC 102).

(y) The laws administered by the Veterans Administration were consolidated in 1957 (PL 85-56), and recodified in 1958 (PL 85-857). The $10.00 fee limitation previously applicable to all VA benefit claims (except those involving litigated insurance matters), previously located in 38 U.S.C. 102, was recodified and placed in 38 USC 3404 where it is presently located.